

Appeal of a decision adjusting estimated rental for a communication site right-of-way to reflect fair market rental value following appraisal. F-87248.

Affirmed.

1. Appraisals--Communications Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

Where BLM granted a communication site right-of-way, subject to a future fair market value appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

2. Appraisals--Communications Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive the Board will affirm BLM's determination.

APPEARANCES: Ward M. Merdes, Esq., Fairbanks, Alaska, for appellant.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Alaskan M.D.S., Inc. (Alaskan), has appealed from a decision of the Steese/White Mountains District Office, Bureau of Land Management (BLM), Fairbanks, Alaska, dated September 28, 1992, adjusting its rental rate on communications site right-of-way grant F-87248 from an estimated amount of \$100 to \$4,320, an amount based upon a fair market value appraisal. BLM requested payment of the adjusted rental retroactively from November 1, 1991, the first day of the month following the date the right-of-way grant became effective. See 43 CFR 2803.1-2(a).

On April 24, 1991, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732 (1988), Alaskan applied for a communication site right-of-way grant to construct, operate, and maintain a television antenna and tower within lot 1, U.S. Survey 4012, sec. 25, T. 1 N., R. 3 W., Fairbanks Meridian, Alaska. Lot 1 is a BLM administrative site, containing 5.28 acres, known as the Ester Dome site. Alaskan requested an approximately 100- by 100- foot parcel within lot 1.

BLM issued a decision on September 5, 1991, proposing a right-of-way grant and requesting that Alaskan sign and return copies of the grant. The decision informed Alaskan that "[t]he rental has been estimated to be \$100.00 pending receipt of a fair market value appraisal," and that Alaskan would be informed of the appraised value by decision. Alaskan signed and returned the grant on September 12, 1991. The District Manager signed the 20-year grant, effective on October 23, 1991. <sup>1/</sup>

Thereafter, BLM requested an appraisal, and by appraisal approved August 9, 1992, BLM established fair market rental value for the Ester Dome site at \$4,800. However, it determined that a communications site right-of-way conveyed only 90 percent of full rental rights. Therefore, it established the annual rental for the right-of-way at \$4,320 and issued the decision under appeal.

On appeal, Alaskan argues that the appraiser's assessment of the value of the fee estate at \$4,800 is incorrect and that the correct value is substantially less; that the right-of-way rental should not be assessed at 90 percent of fee valuation because substantially less than 90 percent of the fee estate's value is conveyed in a right-of-way grant; and that BLM has no authority to "retroactively apply new valuations to time having lapsed since its right-of-way grant was conveyed and hence bill Petitioner for past months at the higher rate" (Notice of Appeal at 2).

[1] We address appellant's final argument first. Departmental regulations at 43 CFR 2803.1-2(c)(3)(ii) provide:

To expedite the processing of any grant or permit covered by paragraph (c)(3) of this section [which includes communications site right-of-way grants] [2], the authorized officer may estimate rental and collect a deposit in advance with the agreement that upon completion of a rental value determination, the advance

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<sup>1/</sup> The grant, at paragraph 3, provides for rental as follows:

"For and in consideration of the rights granted, the holder agrees to pay the Bureau of Land Management fair market value rental as determined by the authorized officer unless specifically exempted from such payment by regulation. Provided, however, that the rental may be adjusted by the authorized officer, whenever necessary, to reflect changes in the fair market rental value as determined by the application of sound business management principles, and so far as practicable and feasible, in accordance with comparable commercial practices."

deposit shall be adjusted according to the final fair market rental value determination. [2/]

BLM's authority to proceed in this fashion has been consistently upheld by this Board. See Oregon Broadcasting Co., 119 IBLA 241, 243 (1991), and cases cited. The intent of BLM to so proceed in this instance was made clear in its September 5, 1991, decision. Moreover, the regulation clearly states that the advance deposit will be adjusted according to the final fair market value rental determination. Thus, Alaskan could not seriously believe that the \$100 deposit would somehow cover rental for the indeterminate period of time prior to BLM's final fair market rental value determination.

The grant signed by appellant also provides that the grantee will pay BLM fair market value rental, as determined by the authorized officer, unless specifically exempted by regulation (see note 1, supra). Appellant does not provide any evidence to support an exemption from rental.

[2] Under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1988), the holder of a right-of-way is required to pay rental annually in advance for the fair market value of the right-of-way when this value is established

by an appraisal. Quality Broadcasting Corp., 126 IBLA 174, 188 (1993); Questar Service Corp., 119 IBLA 65, 67 (1991); Great Co., 112 IBLA 239, 242 (1989). Such value is considered the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." Questar Service Corp., supra, citing American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976). The preferred method for appraising fair market value of non-linear rights-of-way, including communication sites, is the comparable lease method, where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject site and other leased sites. Oregon Broadcasting Co., supra at 243, and cases cited therein; see 43 CFR 2803.1-2(c)(3)(i).

According to the appraisal, the right-of-way is located on Ester Dome, a prominent hill about 10 miles northwest of downtown Fairbanks. Because of its location and elevation, Ester Dome is a prime location for communication sites, and provides coverage for television and radio signals in the Fairbanks and North Pole areas. Alaskan sought the grant in order to locate a microwave television broadcast station on the site to broadcast a single television station to "provide an alternative to people who are outside the service area of the cable TV system" (Appraisal at 4).

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2/ Departmental regulation 43 CFR 2803.1-2(c)(3)(i) provides, in pertinent part:

"[R]ental for \* \* \* non-linear right-of-way grants \* \* \* (e.g., communication sites, \* \* \*) shall be determined by the authorized officer and paid annually in advance. Said rental shall be based on either a market survey of comparable rentals, or on a value determination for specific parcels or groups of parcels \* \* \*."

BLM's appraiser determined that the highest and best use for the site was for a communications site and that its rental could best be ascertained by comparing it with what is being paid for similar use at similar sites. For comparison, the appraiser selected four leases and compared them with the subject site on the basis of location, access, availability of power (on-site generated power versus available commercial power), coverage (the ability of the signals to reach a population or market), and power output or wattage, with a higher output or wattage lease commanding more rental (Appraisal at 4).

Two of the leases reviewed for comparison were located on Ester Dome. Lease 1, issued in 1990, for an FM radio broadcast station, with annual rental at \$12,000, was considered to be a superior lease. While the appraiser determined this lease to be comparable in location, access, coverage, and power, the lease had much higher wattage output compared to the low wattage facility proposed at the subject site.

The second lease on Ester Dome, lease 2, issued in 1991 for a cellular communication facility, was considered equivalent to the subject lease in all areas. Annual rental charged for that lease was \$4,800. Lease 3 was issued in 1977 to the Federal Aviation Administration for an airport surveillance radar. It is located at Metro Field about 2 miles east of the Fairbanks International Airport. The appraiser considered it to be comparable to the subject site with respect to location, coverage, and power, relatively similar for power output, and superior for access. Rental for that lease was adjusted to \$4,800 in 1985. Lease 4 is located on Pedro Dome about 15 miles north of Fairbanks. The lease issued in 1984 for a microwave radio relay station for the Alyeska Pipeline Company at a rental of \$2,000 per annum. The appraiser found lease 4 to be similar to the subject site in access and power, inferior in location and coverage, and relatively similar for power output requirements. Overall, he considered lease 4 to be inferior (Appraisal at 6).

The appraiser concluded that leases 2 and 3, each with rentals of \$4,800 per annum, were most comparable to the subject site. He determined that the rights conveyed by a right-of-way grant are approximately 90 percent. Therefore, he assessed the annual market rental for the property at \$4,800 times 90 percent of the rights, or \$4,320.

Where BLM has appraised the fair market rental value of a communication site right-of-way, such appraisal will not be overturned on appeal unless an appellant is able to demonstrate by a preponderance of the evidence that there was error in the appraisal method used or that the appraised value is excessive. MCI Telecommunications Corp., 115 IBLA 117, 120 (1990), and cases cited. In the absence of a showing of error in the appraisal method used, a BLM appraisal may generally be rebutted only by another appraisal. Id.

Appellant claims that a right-of-way grant conveys "substantially less" than 90 percent of the fee value, and that the underlying fee estate

upon which the right-of-way grant exists is worth "substantially less" than \$4,800 per year. However, appellant has shown no error in the appraisal methods used by BLM, nor has it provided another appraisal or any evidence that the charges are excessive, particularly in light of the rental rates for similar leases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge